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British Yearbook of International Law

Russian Approaches to International Law, by Lauri Mälksoo

Oxford University Press, 2015

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Lauri Mälksoo's monograph is aptly titled. He does not attempt an overview, much less an encyclopaedia of the history of international law in Russia. All the same, for any reader with the slightest interest in the role the Russian Federation plays in the contemporary development of international law, this book is a treasure house of engaged argumentation and extraordinary erudition. Mälksoo has an unrivalled knowledge of the Russian language scholarly literature, much of which is unknown outside the Russian-speaking world.

The book is resolutely up to date and starts and finishes in the present day, with Russia's annexation of Crimea, and with the bruising judgments against Russia in the International Court of Arbitration at The Hague and at the European Court of Human Rights concerning the expropriation of the assets of YUKOS, and the violation of certain human rights of its shareholders.

In his Introduction, he states "Russia's annexation of Crimea will certainly have a considerable impact on the future discourse of international law, in Russia and beyond." This is indeed a book about the discourse of international law. Mälksoo declares himself a social constructivist in terms of theoretical methodology. And, as he puts it "... the main question in this study is: what is the philosophy of international law in Russia and how has it evolved historically?". His hypothesis is that "...because of their different history, culture and 'civilisation', different Great Powers tend to perceive and use international law differently, and even if they violate it, they may violate it differently or for different reasons." And his main argument is that "... a crucial key to understanding the post-Soviet Russian approach to international law is the powerful idea of Russia's civilizational distinctness from the West."

This powerful idea, for Mälksoo, is to be found in Russia's ideological roots in Byzantium, rather than the "Latin West". It will be recalled that the Byzantine Empire was a theocracy of extraordinary longevity, a remarkably durable union of church and state, surviving for more than 1000 years until the conquest of Constantinople in 1453.

The title is plainly intended to refer to some chosen approaches, and focuses in particular on Pyotr Shafirov (1670 – 1739), Fyodor Martens, (1845 – 1909), Baron Mikhail Taube (1869 –

1956), Vladimir Hrabar (1865 – 1956), Fyodor Kozhevnikov (1893 – 1998) and Grigori Tunkin (1906 – 1993). Mälksoo also engages with the legacy of the veteran Soviet and Russian diplomat and scholar Stanislav Chernichenko (born in 1935, and now 80 years old).

Some of these scholars were also the focus of Mälksoo's contribution to this Yearbook in 2005 ("The Science of International Law and the Concept of Politics. The Arguments and Lives of the International Law Professors at the University of Dorpat/Yur'ev/Tartu 1855-1985"), and his articles in the European Journal of International Law in 2008 ("The History of International Legal Theory in Russia: a Civilisational Dialogue with Europe") and 2014 ("F. F. Martens and His Times. When Russia Was an Integral Part of the European Tradition of International Law").

I mentioned the Russian-speaking world. The first writer mentioned above, Shafirov, wrote a justification of the Great Northern War (1700-1721) in which Peter I (the Great) defeated Sweden and gained the territory of present-day Estonia. This was the first international legal treatise in Russia, as Mälksoo notes. It is no accident that Mälksoo has devoted serious attention to Martens in several noteworthy texts, and in 2012 created a splendid annual Martens Summer School on International Law, in Martens' home town of Parnü, where I have had the privilege of teaching. Taube was Martens' pupil. They were both Estonians, who served the Russian Empire with distinction. Martens is immortalised in the famous "Martens Clause", a cornerstone of humanitarian law. The Clause was based upon a declaration read by Martens, who was the Russian delegate at the Hague Peace Conferences 1899, and first appeared in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land. And Hrabar (also known as Grabar) spent his academic life until the 1917 Revolution teaching at Yuriev University, previously known as the Protestant German Dorpat University, now the Estonian Tartu University where Mälksoo himself teaches.

Mälksoo himself is an Estonian, though he is at home in the Russian language and thoroughly familiar with Russian scholarship. His own Estonian language is a member of the Finno-Ugric group which includes Estonian, Finnish, Hungarian, and the languages of a number of the 150 (at least) minorities of the Russian Federation, several with their own republics – Karelians (Republic of Karelia), Komi (Komi Republic), Udmurts (Udmurt Republic), Mari (Mari El Republic), and Mordvins (Moksha and Erzya; Republic of Mordovia). Khanty and Mansi peoples live in Khanty–Mansi Autonomous Okrug of Russia.

Prior to the Great Northern War, the Estonians were ruled by Sweden, as noted above. The local aristocracy and elite were German, the result of the expansion of the Hanseatic League. Tallinn, the capital of Estonia, is a Hanseatic city. In the Peace of Nystadt in 1721, Tsar Peter reconfirmed the Baltic Germans' freedom of religion and *cultus*, which they had enjoyed under Swedish rule, that is, Protestantism including a Protestant University at Dorpat, German administration in town and country, and German law. The Baltic Germans did very well under their new rulers. As Mäliksoo puts it, "... in the eighteenth and nineteenth centuries the Baltic Germans in a certain sense had 'colonized' imperial Russia's ministries and other key positions in St Petersburg." Martens and Taube were of German extraction.

Estonia first emerged as an independent state in the context of the seizure of power by the Bolsheviks in 1917. I add to Mäliksoo's account the fact that Vladimir Lenin was already a proponent of the "rights of nations to self-determination", in fierce opposition to those like Rosa Luxemburg who argued for proletarian revolution in the whole space of the Empire and against bourgeois nationalism. He also attacked the Austro-Marxists Otto Bauer and Karl Renner whose proposals for non-territorial cultural autonomy found support in the Russian Empire's revolutionary Jewish Bund. Lenin, whether cynically or not, supported Estonian independence, notwithstanding that the new government was far from socialist. In the Treaty of Tartu in February 1920 Soviet Russia accepted Estonian independence, and in November 1920 Lenin wrote: "We concluded peace with Finland, Estonia and Latvia also against the wishes of the imperialist Entente, but this was easier because the bourgeoisie of Finland, Estonia and Latvia entertained no imperialist aims that would call for a war against the Soviet Republic..."

Estonia lost its independence as a consequence of the Stalin-Hitler (or Molotov-Ribbentrop) Pact, and was then illegally occupied, indeed annexed, by the USSR from 1940 to 1991, becoming a Union Republic of the USSR and only regaining its independence with the collapse of the USSR in 1991. Annexation has a special meaning for Estonians, and Russia is indeed a repeat offender.

Mäliksoo's distinguished professional career has been spent in independent Estonia, with the benefit of a Starting Grant from the European Research Council in 2009-14, the first of its kind in Estonia, with an Emile Noël Fellowship at New York University in 2013-14, where he wrote this book.

Mälksoo is to be commended for raising the question of “objectivity” early in the book. “... I have sometimes been asked whether I as an Estonian scholar can ‘objectively’ study Russian approaches to international law.” Especially, he adds, in view of the fact that Estonia was part of Russia from 1710 to 1918, and then part of the USSR from 1940/1944 to 1991, nearly 250 years.

In my view, the richness of his intellectual formation and geographical location, in the historical frontier or borderland between the Germanic West and Slavic Russia, a region with a Finno-Ugric majority (like Finland) but with a Protestant German elite, gives Mälksoo’s monograph a unique and at times controversial freshness and energy. Its second half, it has to be said, borders on the polemical.

While he has a tendency to give “the West” more internal consistency than perhaps it deserves, together with his favoured distinction between “liberal” and “illiberal” states”, Mälksoo’s diagnosis of Russia’s particularity is as follows: “If one had to capture the essence of Russian approaches to international law in one historically laden word, it would have to be – Byzantine... the Byzantine strain – in opposition to the Latin West – which the late Tsarist international law Russian-Baltic scholars such as Baron Taube explained and tried to ideologically distance themselves from, is also the ultimate foundation of the continuity between Soviet and post-Soviet approaches to international law in Russia.” He adds that Russia is “...authoritarian in that it tends to have a problem with liberal ideas.”

Mälksoo approves without reservation the words of the Estonian politician and historian M. Nutt who says that the “most visible activity by which one recognises Byzantine diplomacy... is blaming others for what one is already doing or intends to do.”

What of the other authors selected by Mälksoo? Hrabar was not an Estonian, but was born in Vienna and came from a family with its roots in Galicia, now Western Ukraine and previously ruled by the Polish-Lithuanian Commonwealth, the Austrian Empire and later Poland. As noted above, he taught for many years in what is now Estonia. He was the author of what is still a key text for Russian scholars, *The History of International Law in Russia, 1647-1917. A Bio-Bibliographical Study*, published posthumously during the Khrushchev thaw, and translated into English (with his name given as Grabar) by W. E. Butler and published by Oxford in 1990. Much of his work was a dialogue with that of Kozhevnikov, who long outlived him.

Kozhevnikov was the author of many textbooks, from *The Russian State and International Law* in 1947 to the volume with the same title in 2006. Mälksoo has 70 references to Kozhevnikov, who was not only a member of the International Law Commission in 1952-3 and a Judge of the International Court of Justice in 1953-1961, but epitomises for the purpose of his book a conception of Russia as a champion of international law, historically “more progressive” than scholarship in Western Europe. He also expressed the “Eurasianist” idea of Russia’s civilizational distinctiveness and its moral superiority to Germanic Europe.

Three times Mälksoo refers ironically to Russia’s “claim that it has been a champion of international law and the rule of law in world affairs”. In the context of Russia’s membership since 1996 of the Council of Europe, Mälksoo comments that “this is not what a champion of international law looks like”, and adds “...if a country has a problem with legal nihilism domestically, how likely is it that it would simultaneously act as a champion of the rule of law internationally?”.

Mälksoo has in his final section three case studies through which he examines Russian state practice in the field of international law: first, Russia in European and international human rights law; second, international economic law; and coming back to Crimea, Russia, post-Soviet wars, and *jus ad bellum*.

My own primary focus, as Mälksoo kindly notes, has been on Russia’s membership of the Council of Europe since 1996 and participation in the European Convention on Human Rights since 1998. I have represented a great many Russian (including Chechen) applicants at the Strasbourg Court. Both Russia and Britain have a conflicted relationship with Strasbourg, and Russia’s relations with Estonia and for that matter Ukraine seem to me to have much in common with Britain’s relations over centuries with Ireland. As Russia suffers uncomfortable judgments in relation to Chechnya and Transnistria, so the UK has unresolved issues concerning Northern Ireland (the *McKerr* and *Finucane* cases, extra-judicial executions during the armed conflict 1969-1997) and Iraq (*Al-Skeini* and *Al-Jeddah*). There is more. Both Russia and Britain suffer an existential crisis of identity related to the recent loss of empire, Russia its great continental empire, and Britain its maritime empire which encircled the globe, and this crisis infects relations with Strasbourg.

For Mälksoo, Britain is a “liberal” state where Russia is “illiberal”. He uses the word “liberal” 60 times, in various combinations – “liberal states”, “European liberalism”, “Western liberal values”, “Western thinking about international law as liberal and

cosmopolitan in its foundations”, “the maritime, liberal West”, “liberal Western ideas”, “liberal political philosophy”. If I have a criticism of Mälksoo, it is that the opposition he establishes is rather too stark.

Moreover, Mälksoo does not engage with the strong reformist tradition in Russia (sketched in my own recent book) starting in the 18th century with the “Russian enlightenment”, continuing with the abolition of serfdom and Great Legal Reforms of Aleksandr II, the intellectual ferment of the late 19th and early 20th century with writers such as Kistyakovsky and Struve, and the dissident movement which blossomed after the USSR approved the Helsinki Declaration of 1975 – an unintended consequence was the collapse of the USSR in 1991.. He mentions my work on the extraordinary circumstances of Russia’s accession to the Council of Europe, but in my view the lasting impact of Russian engagement with Strasbourg is more profound and deeply rooted than Mälksoo allows.

There is a particular striking absence in Mälksoo’s book, namely his fellow Estonian Rein Müllerson, mentioned only in passing. Müllerson, from an older generation than Mälksoo, was a leading, perhaps the leading, international lawyer of the late Soviet period. He served as a member of the United Nations Human Rights Committee. His fellow member, and later President of the ICJ, Rosalind Higgins, invited him to the London School of Economics, following which he was a Professor at Kings College, London. Müllerson’s Soviet era works include his review of A P Movchan’s *Human Rights in International Relations* in the Soviet Yearbook of International Law in 1983; his 1988 article with V S Vereshetin, later a Judge of the ICJ, “New thinking in international law”; his 1990 article with Vereshetin and the late Gennadiy Danilenko “Constitutional reform in the USSR and international law”; and his crucial and often cited 1991 monograph *Human Rights: Ideas, Norms, Reality*. From 1994 he has published several monographs in English.

I may therefore be permitted to conclude this enthusiastic review on a more optimistic note. I have for the last 10 years served as one of the more than 100 judges for the Russian round of the Philip C Jessup International Law Moot Court Competition, with teams of students from at least 45 Russian law schools, from Kaliningrad to Vladivostok. These hundreds of young men and women draft 8,000 word Memorials for each side in English in a fictional case before the International Court of Justice, and plead in English in oral rounds in Moscow, with the best seven or so teams travelling to Washington DC for the international finals. The Moscow finals are judged by real international judges from The Hague and Strasbourg. The students have an excellent knowledge of international law, including human rights and

economic law, and a few years ago were the winners in the international rounds, with 90 countries taking part, in Washington DC.

This year's case concerned annexation, on facts close to those of Crimea, and it was fascinating to hear the young Russians arguing each side. Young people from the winning teams are now active participants in law reform in Russia. Perhaps this is Müllerson's own Estonian legacy.

I would not disagree very much with Mälksoo in his characterisation of the present regime in Russia, and its cynical approach to the rule of international law. But there are reasons to believe that Russian lawyers will in due course make significant contributions to the progressive development of international law.